V Paul Raj Chelladurai v Jabatan Telekom (M) Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01-6 OF 1994

SITI NORMA YAAKOB, MAHADEV SHANKER AND DENIS ONG JJCA

25 APRIL 2000

Administrative Law *— Remedies — Certiorari — Application to quash decision of disciplinary board — Issue raised on appeal not pleaded in original application — Whether appeal valid — Rules of the High Court 1980 O 53 r 3(1)*

The appellant was dismissed after disciplinary proceedings were instituted against him for receiving a bribe. After his appeal to the disciplinary appeal board failed, he filed an originating motion to the High Court for leave and subsequently filed a motion for a certiorari to quash the decision of the disciplinary appeal board. The motion was dismissed. The appellant's contention in the appeal with regard to his allegation of procedural unfairness was that he was not informed of the nature of the extraneous matters that the disciplinary board had taken into account when considering the charge against him and that he was not given the opportunity to plead in mitigation before dismissal was decided against him. This was because the phraseology '*dan lain-lain maklumat yang berkaitan*' ('and any other relevant information') appearing in the board's letter of dismissal dated 19 November 1986 implied that other extraneous matters of which the appellant had no notice of, had been considered and accepted by the board before he was found guilty of the charge. The appellant contended that since he was not given the opportunity to rebut or comment on such extraneous matters, the disciplinary proceedings were flawed and tainted with irregularity.

Held, dismissing the appeal:

Pursuant to O 53 r 3(1) of the Rules of the High Court 1980, the appellant could only rely on the grounds and reliefs that were set out in the statement. On the facts, the appellant did not raise objections to the use of the phraseology '*dan lain-lain maklumat yang berkaitan*' and the loss of opportunity to plead in mitigation. These objections were only raised for the first time in the Court of Appeal. Order 53 r 3(1) emphasizes the principle that a party is bound by his pleadings and the omission to plead the two objections raised was a sufficient reason for the court to conclude that the appeal lack merits (see p 656B, G-H).

[Bahasa Malaysia summary

Perayu telah dipecat selepas prosiding-prosiding disiplin dibawa terhadapnya kerana menerima rasuah. Selepas rayuannya kepada lembaga rayuan disiplin gagal, beliau memfailkan usul pemula ke

Mahkamah Tinggi untuk kebenaran dan kemudian memfailkan usul untuk suatu certiorari untuk membatalkan keputusan lembaga rayuan disiplin. Usul tersebut telah ditolak. Penegasan perayu di dalam rayuan berkenaan dengan pengataan ketidakadilan prosedur adalah beliau tidak diberitahu mengenai perkara luaran di mana lembaga disiplin telah mengambil kira semasa mempertimbangkan pertuduhan terhadapnya dan bahawa beliau tidak diberikan peluang untuk memberikan hujahan hukuman ringan sebelum pemecatan diputuskan terhadapnya. Ini adalah kerana rangkai kata 'dan lain-lain maklumat yang berkaitan' yang tertera di dalam surat pemecatan lembaga bertarikh 19 November 1986 menyiratkan bahawa perkara-perkara luaran yang lain di mana perayu tidak mempunyai notis, telah dipertimbangkan dan diterima oleh lembaga sebelum beliau didapati bersalah untuk pertuduhan tersebut. Perayu telah menegaskan bahawa oleh kerana beliau tidak diberikan peluang untuk menjawab atau memberi komen di atas perkara-perkara luaran tersebut, prosiding-prosiding disiplin adalah cacat dan terdapat luar aturan.

Diputuskan, menolak rayuan tersebut:

Menurut A 53 k 3(1) Kaedah-Kaedah Mahkamah Tinggi 1980, perayu hanya boleh bergantung kepada alasan-alasan dan relif-relif yang dibentangkan di dalam pernyataan. Di atas fakta, perayu tidak membangkitkan bantahan-bantahan kepada penggunaan rangkai kata 'dan lain-lain maklumat yang berkaitan' dan kehilangan peluang untuk memberi hujahan hukuman ringan. Bantahan–bantahan ini hanya dibangkitkan buat kali pertama di Mahkamah Rayuan. Aturan 53 k 3(1) menekankan prinsip bahawa sesuatu pihak adalah tertakluk kepada pliding-plidingnya dan ketinggalan untuk memplid dua bantahan tersebut yang dibangkitkan adalah sebab yang mencukupi untuk mahkamah menyimpulkan bahawa rayuan tersebut kekurangan merit (lihat ms 656B, G–H).]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 135–306.

Cases referred to

Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 MLJ 308 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 42(1)

Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 general orders 4(2)(c)(ii), (f), (g), 26

Rules of High Court 1980 O 53 rr 1(1), (2), 3(1)

Appeal from: Originating Motion No R2-25-46 of 1993 (High Court, Kuala Lumpur)

Saran Singh (*Saran Singh & Co*) for the appellant.
Al-Baishah bte Abdul Manan (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Siti Norma Yaakob JCA (delivering judgment of the court): At the outset, we wish to say that this judgment is delivered in circumstances falling within s 42(1) of the Courts of Judicature Act 1964. A member of the panel who heard this appeal, Mahadev Shanker JCA has since retired as a judge of this court and it now befalls on the remaining members of the panel namely, Denis Ong JCA and I, to determine this appeal on facts that appear as follows.

The matter came before us by way of a judicial review in respect of a wrongful dismissal dispute which originated when disciplinary proceedings were commenced by the disciplinary board ('the board') of the first respondent against the appellant under general order 26 of the Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 ('the Orders'). The first appellant had employed the appellant as a daily rated labourer on 5 April 1955, but over the years the appellant obtained recognition for his work and through successive promotions, he was by 1986, placed on the pensionable establishment.

By a show cause letter dated 30 August 1986, the board informed the appellant that following an adverse report made against him, disciplinary action would be taken with a view to his dismissal under general order 26 of the Orders. He was charged that on 19 January 1984, two weeks before the Chinese New Year, he accepted an 'ang pow' of RM20 for services rendered in installing a telephone at the premises of a businessman who managed a laundry shop. Not content with the RM20, the appellant was alleged to have demanded by force another RM10 from the same businessman and his conduct in accepting and demanding such gratification was dishonest and irresponsible and that he had used his public position for his advantage in breach of general order 4(2)(f), (g) and (c)(ii) of the Orders. The appellant was given 14 days from the date of the receipt of the show cause letter to make his written representations to exculpate himself.

He did so in his letter dated 17 September 1985, wherein he denied the charge and gave his side of the story as to what had happened. He maintained that on the day in question, in addition to installing the telephone at the premises of the businessman, he was also asked to add an illegal extension in the kitchen of the premises. He refused to do so whereupon the businessman pushed some money into the shirt pocket of a colleague who was assisting him at the time. When his colleague returned the money, the businessman was chided for trying to bribe him. After the installation work was complete, the businessman offered an 'ang pow' to him but he refused to take it and he maintained that because of this rebuff, the businessman had filed a complaint against him.

On 1 December 1986, the appellant through his head of department received a letter dated 19 November 1986, from the board informing him

A that the board had considered the charge and his defence to it and had decided to dismiss him from his employment with effect from 1 December 1986. The appellant was also informed that he had the right to appeal against the decision to the disciplinary appeal board ('the appeal board') of the second respondent within 14 days from 1 December 1986.

B On 6 December 1986, the appellant submitted his appeal through his head of department and in his undated letter, he again reiterated his denial of the charge and appealed that the decision to dismiss him be withdrawn.

Six years and three months later, the appellant was informed by letter dated 26 February 1993, that the appeal board of the second respondent had dismissed his appeal and confirmed the punishment of dismissal C imposed on him by the board to take effect from 1 December 1986. A copy of a letter dated 23 February 1993, containing the decision of the appeal board of the second respondent was also enclosed for the appellant's information.

It was following this that the appellant challenged the propriety of the D disciplinary proceedings that had been brought against him, in the High Court. He filed firstly an originating motion ex-parte dated 23 March 1993, for leave under O 53 r 1(1) and (2) of the Rules of High Court 1980 ('the RHC'). Subsequently he filed another originating motion dated 7 September 1993, praying for an order for certiorari to quash the decision of the appeal board of the second respondent and to restore him to the E position that he held with the first appellant including all benefits due to him. The High Court declined to issue an order for certiorari and dismissed the appellant's motion with costs.

Appeals of this nature invariably boil down to the objection that there had been procedural unfairness in the conduct of the domestic enquiry F leading to the decision to dismiss. In this instance the procedural unfairness alleged by the appellant before us is confined to the following matters:

(1) He was not informed as to the nature of the extraneous matters that the board had taken into account when considering the charge against him.

G (2) He was not given the opportunity to plead in mitigation before dismissal was decided against him.

Relying on the decision of this court in the case of *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308, it is the appellant's contention that the H phraseology '*dan lain-lain maklumat yang berkaitan*' appearing in the board's letter of dismissal dated 19 November 1986, implies that other extraneous matters of which the appellant had no notice of, had been considered and accepted by the board before he was found guilty of the charge. Since he was not given the opportunity to rebut or comment on such extraneous matters, the disciplinary proceedings were flawed and tainted with irregularity.

I The case of *Raja Abdul Malek* which was also a wrongful dismissal suit was decided on the specific objection expressed in the pleadings that the phraseology '*dan lain-lain maklumat yang berkaitan*' in the letter of dismissal gave the distinct impression that certain material information was

considered and given weight and which was never put to the appellant. That was a writ action followed by a trial where the appellant gave evidence but the respondents elected not to call any evidence and as such gave no explanation what was involved in the penultimate phraseology. It was under those circumstances that this court held that the phraseology '*would leave a reasonable man with the distinct impression that the defendants considered and gave weight to certain material information that was never put to the plaintiff. Of course it was open to the defendants to have given a full explanation as to what was meant by that critical phrase ... But the defendants took the option of remaining silent:*'.

In the instant appeal before us, proceedings in the High Court were governed by O 53 of the RHC where only affidavit evidence were relied upon by both sides. Under O 53 r 1(2), the application for leave must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought. Under O 53 r 3(1) no other grounds or relief other than those set out in the statement shall be relied upon at the hearing of the originating motion on its merits.

In his statement dated 23 March 1993, the appellant identified the following grounds on which he sought the order for certiorari.

(1) He was not informed of the charge against him.

(2) His supervisor had never complained about his work.

(3) The respondents had failed to inform him to be present at the disciplinary inquiry before the decision to dismiss him was made.

(4) The respondents had breached the rules of natural justice.

(5) The respondents' action had not followed established principles.

(6) He was not given the opportunity to defend himself.

(7) The respondents took into account irrelevant matters.

(8) The respondents failed to consider relevant factors.

(9) He was not given a warning before he was dismissed.

Clearly from the aforesaid grounds, the appellant never raised as issues his objections to the use of the phraseology '*dan lain-lain maklumat yang berkaitan*' and the loss of the opportunity to plead in mitigation. These two objections were only raised for the first time before us as in the court below the appellant was more content to submit on other issues. Order 53 r 3(1) of the RHC emphasizes the principle that a party is bound by his own pleadings and since that order and rule is mandatory in nature, the omission to plead in the statement the two objections raised before us is sufficient reason for us to hold that this appeal lack merits and on that conclusion we dismiss it with costs, confirm the order of the High Court and order that the deposit be paid out to the respondents to account of their taxed costs.

Appeal dismissed.

Reported by Chin En Tek